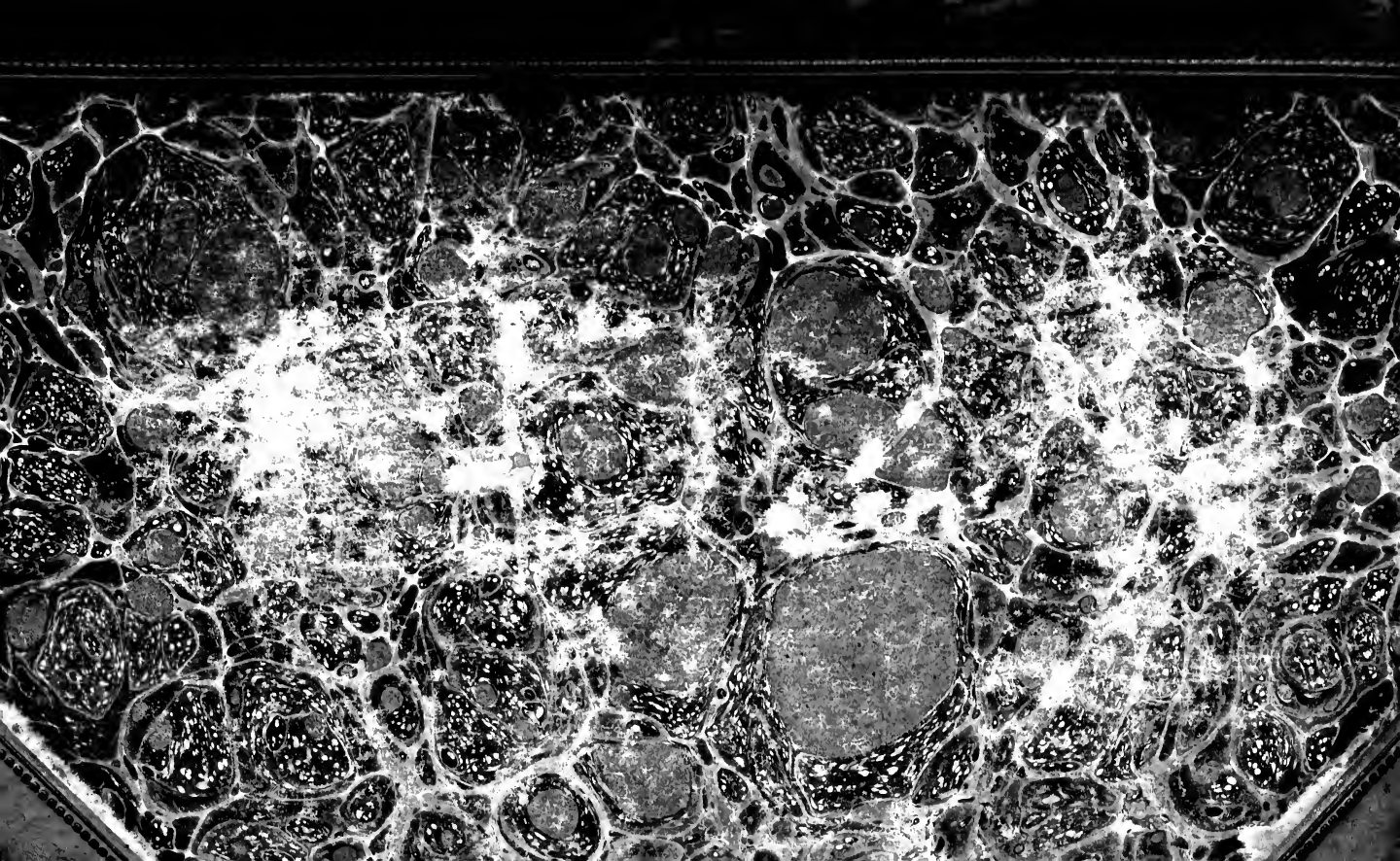

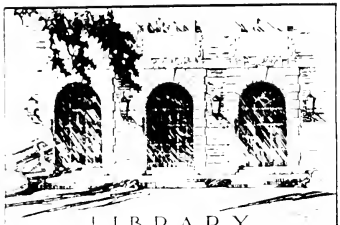

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ON THE FORFEITURE OF PROPERTY BY MARRIED WOMEN.

BY

ARTHUR HOBHOUSE, Q.C.

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WITH

AN APPENDIX.

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ON THE FORFEITURE OF PROPERTY BY MARRIED WOMEN.

Expected action in Parliament.

AS the session of Parliament approaches, our thoughts are apt to turn from the theoretical to the practical aspect of public affairs. During the recess numerous volunteers meet in various parts of the country, write in public journals, interchange their ideas, explode many crotchets, find some that will stand the wear and tear of discussion, prepare, on all tenable views of a question, that mysterious and spiritual, but very real, power called Public Opinion, and so clear the field for action. And this, doubtless, is the great originating and determining force of modern society. The man who has carried his point through the open public arena of discussion, will surely, sooner or later, carry it through the Legislature. It may be a long time first; the Legislature is the last body to be moved; and quite rightly so, for laws ought not to be altered lightly, nor without clear proof that mischief flows from them, and that reasonable grounds exist for expecting better results from the alterations propounded. It is therefore natural that when Parliament meets we should look to see which of the subjects that occupy the national attention will be selected for actual operations, and what course the operations are likely to take.

Past stages of the controversy.

The important subject indicated by the heading of this paper is one on which the Legislature will certainly be asked to act in the ensuing session; possibly by the Government, but, if not, then by private members of Parliament. And it seems not inopportune to take a brief review of the position of the case, and to direct some observations to the only features of it which possess any novelty or are left uncovered

by argument. The subject is one of those which have been agitated for many years, and has gone through the usual stages of a novel truth. It was the wildest of dreams; it was an impious and unholy attempt to loosen the sacred bonds of marriage; its promoters, when not fanatics or dreamers, were dangerous and sinister revolutionists. Then there was something in what they said; after all, there was a good deal of cruelty and hardship in the present system; after all, the law of property seemed to have very little to do with the bond of marriage; after all, the law of England was peculiar, and seemed to resemble the old barbarous codes much more closely than those adopted by civilised nations. Finally, a large number of people found out that what the advocates of a change were saying was exactly what they themselves had been thinking all along.

All honour to those who have fought the losing game till it has become the winning one. I am not one of them. The work has been done at first by the able and persevering gentlemen who form the United Societies for the Amendment of the Law and the Promotion of Social Science, and finally by Mr. Lefevre and Mr. Russell Gurney, who have taken up the subject in Parliament. And if I recur to what I myself have previously said, it is not because there was any originality in it, but only because it was an attempt to put the controversy into a clear and compendious form, to which it may be useful for any one to refer who desires to study its merits.

Mr. Lefevre's Commission.

The later stages of this discussion have been on this wise. In the session of 1868 Mr. Lefevre introduced into the House of Commons a measure which was referred to a Select Committee. Much evidence was taken, bearing mainly on three points:—

1. The existence of hardship under the present law.

2. The avoidance of that hardship by the richer classes through the aid of the Court of Chancery.

3. The practicability of altering the law, as tried in America.

In July, 1868, the Committee reported to the effect that the law bore very hardly on all but the richer classes; and that American experience was in favour of altering it; but, for lack of time, they did not decide in what particular mode the law should be altered.

In the month of September, 1868, the Social Science Congress took place at Birmingham; and I then read a paper in which the subject was reviewed. It was then shown that the rule of law to be altered was that of the Common Law, which, speaking broadly, takes all property from the wife and gives it to the husband; that this rule had in effect been abrogated by the Court of Chancery in many cases affecting those rich enough to enjoy its protection, and that rich people were also in the universal habit of excluding its operation by the expensive machinery of private contract and the interposition of trustees. The law, therefore, is divided against itself, and one part of it must be wrong; either that part which has been established in Chancery and which affects rich people, or that rule of the Common Law which affects poor people. And it is the latter rule to which mischief is traced; against the former no charge is brought. Moreover, it is the latter rule which has prevailed in rude and barbarous societies, and has been encroached on as civilisation has advanced.*

Paper read at Birmingham. Social Science Meeting: Review of the arguments.

The objections put forward were then dealt with, most of them being of a very flimsy character and admitting of obvious specific answers. The most important was that which is founded on the principle that the husband must, in case of dissension, determine the general course of family affairs, *e.g.*, the common residence and perhaps the common occupations. To this it was answered, that the wife ought to have due weight in the family councils; that there are many domestic matters in which women are better judges than men; that there are many women who are wiser and stronger than their husbands; and that it is a monstrous thing to assume that the husband must always be right, and therefore to give him in all cases the power of stopping the supplies, and so starving into submission the wife who is not convinced by his arguments nor bent by the weight of his authority. Finally it was urged, that over and above the specific answer to each objection, there was one general and conclusive answer to all, *i.e.*, the

* This idea was worked out with great learning and force by Mr. Jessel in his speech in the House of Commons. His belief is, that the marital rights conferred by the Common Law are simply remnants of the old system of slavery, under which the women of the family were slaves to its head. Nor is it easy for anybody who will fairly weigh his proofs, to deny their cogency.

answer from experience. For that many of the United States and some of the British Colonies had been making experiments in this direction, that none of them had repented or drawn back from what they had done, but on the contrary, all that had taken more than one step, had advanced towards the complete emancipation of married women from the law of forfeiture, and that the evils, plentifully prophesied on the Western as on the Eastern seaboard of the Atlantic, had not yet made their appearance.

Mr. Gurney's Bill.

In the session of 1869, a Bill was introduced into the House of Commons by Mr. Russell Gurney, which embodied the principle contended for. It provided in effect, that married women, or at least those married subsequently to the Act, shall be as capable of holding property as single ones. The Bill was referred to a Select Committee, by whom the principle was preserved uninjured. The third reading was carried in the House of Commons by a large majority, but the measure was stopped in the House of Lords, on the ground that its provisions required further consideration.

New phase of the Opposition

It is not my object now to discuss the provisions of the Bill in detail. Indeed I have throughout confined myself to discussing principles. It is because there were some, though uncertain, indications in both Houses that alterations might be proposed, which, though in the form of details, would really defeat the whole measure, that I am anxious to recall attention to the previous stages of the discussion, and to add some observations on the threatened danger. And I am the more anxious to do this, because the alterations in question seem to find favour not only with those who, consenting to change merely because the advocates of change are too strong for them, really hate the Bill, and will substitute a changeling for it if they can, but with some who are sincerely convinced of the evils of the present system, and wish to see a remedy applied to them. Neither do I propose to amplify or add to the arguments contained in the Birmingham paper. It is there stated that I had not the advantage of seeing any detailed or methodical statement of the objections to altering the law. Neither have I now; and I may fairly assume in so contentious a matter, that arguments asked for but not yet adduced do not exist; and that those which have been adduced for the change, and have not been answered, are unanswerable. I wish now to

address myself solely to the suggestions, that the necessities of the case will be met by extending the remedies of wives under the Divorce Act, and that it would be for their advantage to tie up their property for themselves and their children.

Protection orders: Proposed extension of the system, and reasons against it.

At the present time, if a wife is deserted by her husband she may apply to a magistrate, who may grant her an order of protection, the effect of which, to use popular language, is to place her as regards ownership of property in the position of a single woman. It is suggested that these powers of magistrates might be largely extended, so largely in fact as to give to wives all the protection they need. I have never seen any statement of the mode in which it is proposed to do this, and I shall be surprised if any can be put into definite words and not forthwith break down by its own weakness. But the proposal is so faulty in principle, that on principle it ought to be decided, and we ought never to arrive at the stage of discussing specific provisions for this purpose.

In the first place I would ask, For what reason is a change desirable at all? and then would ask Whether that reason is satisfied by facilitating protection orders?

It must be remembered that I am addressing myself to those who are convinced that, for some reason or other, probably one or more of those contained in the Birmingham paper, a change is necessary. Is it on account of the abstract justice of the case? Then what justice is there in providing that a husband's property shall be secured to him by the simple operation of the law without any misconduct on the wife's part, but that a wife's shall be taken away from her unless her husband ill-treats her and she has the courage to embark in a litigation and the luck to emerge successfully from it?

Is it because good laws ought to harmonise with the arrangements which people make for themselves when they have knowledge and power enough to act for themselves! Then follow those arrangements, so far as they are applicable to the subject matter you are handling, and make the property of wives theirs by direct right, and not merely on condition that a magistrate thinks they have suffered ill-treatment enough to claim it back from their husbands.

Is it because there ought not to be two contradictory laws—one for the rich and one for the poor? Why, such a measure would make the contradiction more sharply defined, more

glaring than ever. I would ask any advocate of such a measure, Would you be content to mete it out to your own daughter? If she marries, will you consent to abstain from securing to her any property of her own, in consideration of her getting more favourable opportunities of appearing in a police office?

Is it on account of the lessons afforded by Transatlantic experience? Then that experience teaches us to make married women owners of property, not to give them greater facilities of prosecuting quarrels with their husbands.

Is it because you are convinced that giving one consort's property to the other is no proper part of the contract of marriage—is only the remnant of an old barbarous law and is not necessary to preserve harmony or due subordination in families? Then such a gift should not be made by the law at all, and its existence should not depend on the chance of the parties remaining in more or less friendly relations with one another.

Or is it simply because you are struck with remorse at hearing evidence of the shocking cruelties which spring from the present law? Then look at the evidence again, and you will find that many even of the evils brought to light are such as it is most difficult to remedy through a court of justice. And depend upon it that where, in a delicate and painful matter, so much comes to light, much more remains in darkness, and that for one case that could be reached by the action of a magistrate, scores, or even hundreds, would be reached by a simple change of the principle of law. Those who contend that the principle of the law is not bad are bound to give some satisfactory explanation of the phenomena, to tell us why sufferings are so frequent among those who remain subject to it, and why all who can escape from it, do so. No such explanation has ever been attempted. The principle then *is* bad. The particular cases that appear are only the symptoms. But it is childish to treat the symptoms separately while the cause remains untouched. It is about as wise as to let your child go on with an unwholesome diet, but to make it very easy for him to see the doctor as each fit of sickness occurs.

Settlements: Proposed extension of them, and reasons against it.

I now pass to the other suggestion—viz., to protect wives by taking away their property from them, and putting it into settlement. This is a much more serious affair. To reduce

the measure to a system of protection orders would probably be nothing worse than to reduce it to a nullity. Indeed, in that shape it might do a small quantity of good. But if turned into a system of settlements, it would indeed be a serious aggravation of existing mischief. Here again I do not understand (for it has never been explained), what machinery is contemplated, nor whether it is proposed to make a universal settlement by Act of Parliament, or only to seize and settle property in those cases in which a protection order has been obtained. The only difference between the two cases would be that in the latter the Act would have little scope, and therefore would do comparatively little harm.

The plan, doubtless, is suggested by the course usually taken in marriage settlements, and would naturally be one of the first things to occur to lawyers more familiar with such arrangements than with the short and simple annals of the poor. I will not here discuss the policy of the ordinary marriage settlement for the rich. I do not admire it, but it is not necessary for the argument to take so wide a range. It is sufficient to say, that for one rich person affected by the measure there will be a thousand poor; that it is, in fact, a measure for the poorer classes of society; that it will leave the power of settlement by private contract unaffected for those who choose it; that the poorer classes do not choose it; and that to force it on them would be a great hardship.

How are such settlements to work? In what custody is the fund to be placed? Is the settlement to embrace earnings? And if not earnings, then savings from earnings? Are the children to have a right of calling their mother to account to show what she has laid by, or what she has received by gift from others, or by succession? Whom will you get to act as trustees?

All these questions must be answered before the proposal can float. The only answer I have heard to any of them is a suggestion by some gentleman that municipal corporations might act as trustees—a suggestion which can do little more than provoke a smile. Yet without machinery the plan must break down.

Supposing, however, it could be carried into effect—every little gift, legacy, or windfall, would have somehow to be put into settlement, unless we place a limit of value below which

nothing should be settled. Such a limit would hardly be placed above say £200, even that would exclude the vast majority of cases. But who has watched the course of settlements of even much larger sums, say £2,000, without observing the enormous proportion which the expense bears to the sum settled, and the continual efforts that are made now to get a little more interest, and now to encroach on the capital? Those efforts represent the uneasiness of the parties affected by the settlements. The sum falling under such an Act as this would in few cases exceed £300 or £400. And sums of that or of much larger amount are far more beneficially applied when left free to be used for the exigencies of the family, than when tied up, and made available only by way of income. Rich people may afford to put by a sum of money, and say that there it shall lie for a term of years. The poor cannot; the possession of a little capital often makes to them the whole difference between getting a start in life and losing it, between moderate success and total failure; they have no margin, and no friends to fall back on for the critical occasions when money is necessary.

Besides and beyond the crippling effect of tying up money comes the demoralising effect of expectations. They are peculiarly noxious to the poor and ignorant, who always exaggerate them, often relax their exertions on account of them, and not seldom discount them. When Eutrapelus wished to ruin a man he gave him fine clothes. If I wished to throw sore temptation in the way of a humble family, I would put a couple of hundred pounds in strict settlement for them.

But if settlements are such good things why not extend them to men?

When women ask that marriage may not operate as a forfeiture of their property, they are to be told that it must be kept for their children. It is difficult to see why the same principle should not be applied to men when they marry. If the arrangement is based on the good of the children, it must be the same to them from whichever parent the money comes. If based on the good of the wife, is it not rather wiser to let her be the judge, whether it is for her good or not? The argument must come ultimately to this—that women when they marry are such poor weak creatures that they cannot be trusted to deal with their own money; they cannot judge

whether to keep it or spend it; whether to bestow it on their husbands or themselves, or their children, or elsewhere; therefore the law shall step in, assume in every case that a woman ought to settle money on herself and her children, and make that arrangement for her.

To this I answer—First, the weakness is assumed without proof, or without better proof than some coarse dictum of Lord Thurlow's. Women know how to hold their own where they are accustomed to act. Give them legal rights, and wait to see whether or no they will use them. Secondly, that the circumstances and needs of people vary infinitely, and to apply one Procrustean rule of law to all will produce, first misery, and then revolt against the law. Thirdly, that the proposed legal assumption of what it is right for a woman to do with a small sum of money is so unwise that the weakest woman commanded by the most tyrannical husband could not do worse with it. Fourthly, that it is somewhat hard measure for those who come complaining of their unprotected state to be told that they are quite right, but that they want a great deal more protection than they ask for, and shall for the future be protected not only against their husbands, but against themselves.

I will only now add that for myself I would sooner see no measure at all carried than one establishing a system of settlements; and I believe the gentlemen who have given years of labour to the ripening of opinion for the reception of Mr. Russell Gurney's Bill are of the same opinion.

ARTHUR HOBHOUSE.

APPENDIX.

The contest is now between Mr. Gurney's Bill and Mr. Raikes's.

Since the foregoing observations were penned a portion of the then future has been laid open to us, and two things then hidden have become revealed.

First, it is clear that the Government are so loaded with important business that they will not find time for official action in this matter. Secondly, Mr. Raikes and others have introduced into Parliament a Bill which may be taken as embodying the views of those who are at length persuaded of the necessity of a change in the law, but who cannot make up their minds to accept freedom with its consequences.

Character of Mr. Raikes's Bill.

The distinctive character of this Bill is explained in the first seven sections, of which I will endeavour to give a brief exposition, without, I hope, any substantial sacrifice of accuracy, though for the sake of clearness some details are omitted.

Wife's property to be fettered.

The main principle is that a wife shall not, irrespectively of the question what she earns, be free to own property, but that her property shall, in the absence of contract, be placed under strict settlement.

Plan for Trustees.

For this purpose trustees must be provided. And it is proposed, in the first instance, to make the husband himself the trustee. If, however, the wife chooses she may obtain from the County Court an order of the Judge making himself and a Vice-chancellor the trustees. And other persons interested in the property may apply to the judge to have other trustees appointed; an application which is to be litigated and adjudicated in due form.

The Trusts.

Such being the trustees, the Bill goes on to declare the trusts. In the first place the husband-trustee is precluded from receiving any of the property without a written order by his wife, and from altering any investment without a judge's order

Husband and wife may jointly apply to the judge, and may have trusts declared by him, provided they fall within the range of those usually inserted in settlements by the Court of Chancery, but with a freer range of investment. In default of any such declaration, the trustees may invest with the written consent of the wife, and the judge's sanction, and hold the funds upon strict settlement trusts; viz., during marriage for the separate use of the wife without power of anticipation, with remainder to the husband for his life or until he aliens or becomes bankrupt, with remainder to husband and children as the wife by deed or will appoints, and in default of appointment for the children equally, and if no children, as she appoints by will, and in default of that appointment for her next of kin. If she survives her husband she again becomes absolute owner of her property.

Such are the provisions which are to regulate the wife's property, "except such parts thereof as are transferable by "mere delivery," and apparently without any limit of value.

Effect of the plan.

1. As regards the majority.

The first question that occurs to one to ask is, How will this legislation affect the mass of mankind? And it appears that we shall be legislating for the minority with a vengeance. The present law is found to work much evil in a substantial number, though still a minority, of cases. The good that it works is not discoverable. "Therefore," say reformers, "the law is a bad one; let us alter it and set people free: "where it now does no evil, it is because people of their own free "will manage their affairs with good sense and good feeling; "where it does evil, it is because one is unduly subjected to "another. Give liberty to all, and that will be the best "guarantee for the good conduct of their private affairs." Upon which up start a set of philanthropic gentlemen and declare that the remedy is not to be sought in the spontaneous action of each family, but in the extension of a paternal government which shall dictate to all how an important portion of their private affairs is to be managed. So because A neglects and periodically plunders his wife, B, C, and the rest of the alphabet and their wives, who have done no wrong, are to be invaded by Mr. Raikes at the head of a posse of County Court judges, Vice-chancellors, and other trustees: and (all I presume at the expense of the fund) are to have their property impounded, placed in the hands of one man, invested at the discretion of

another, made incapable of alienation, and given over to be dealt with by deeds and wills, or else to go to children or next of kin whom neither may wish to benefit.

I cannot now follow this into further detail; but I will ask anybody to imagine the faces of some honest carpenter and his wife, when a legacy of £50 has just accrued to the latter, and when they have been discussing how pleasant it will be to buy that much-wanted stock of timber or some better machinery and to extend their operations, or to start son John in business, or daughter Anne in marriage, and when they have just been told that Mr. Raikes's Act has benignly settled all these matters for them, and that the £50 cannot be dealt with except by His Honour the County Court judge, and that nothing of it except the income can be enjoyed during the marriage, unless they can prevail upon him, after a formal hearing, to make some different arrangement in accordance with the practice of the Court of Chancery. How grateful our honest friends would feel towards such legislators! And how much of the fund would remain after all the business was settled! That such an Act would benefit lawyers and, on a short-sighted view, the Chancellor of the Exchequer, is not to be doubted; neither is it to be doubted that it would be a frightful plague among the poorer classes.

2. As regards the cases of hardship.

And how would it affect the husband who swoops down upon his wife periodically for supplies? Her cash, her bed, her chairs, her crockery, nay the very bread and butter she may have laid out for her meal, would it seems still belong to him; all these things being "transferable by mere delivery." She, too, has, we will say, a legacy of £50. He is the trustee of it until a legal proceeding is taken to displace him. Upon her death he is her successor in the enjoyment of the income; and whatever her necessities may be, not a penny of the capital can be employed in their relief, unless with his consent and after fresh legal proceedings which may or may not be successful. Such provisions appear to be as inefficient against the evil-doer as they are oppressive upon the innocent.

Arrangements when the wife earns half the family expenses.

The foregoing provisions relate to gross amount of property, irrespective of the wife's earnings. With respect to earnings, the Bill provides that when a wife can show that for six months she has earned more than half the expenses of her family the judge of the County Court shall *have power* to grant her a

protection order. When the order is granted the provisions for making her a free woman need not be excepted to. But that she should be driven to institute a suit for an account which is sure to be disputed in a hostile case, and may be very minute and intricate, and after all is left to the discretion of the judge, is no slight evil. The cost would be an effectual bar to it in most cases. And why should her freedom depend on so grotesque and capricious a criterion as her earning half the expenses of her family? The mother of a family has something to do besides earning money. Numbers of cases might be put to show the fallacy of such a test. I will put on'y one, which may easily happen in factory towns. Suppose a woman with a large family of children, doing little paid work herself, but receiving and managing the earnings of the children, superintending the household and keeping it together. Why should not she have any little property of hers protected against a bad husband? Yet Mr. Raikes's test would leave her in the lurch. Her property passing by mere delivery would be his, and other property would be seized and strictly settled in the mode before described.

Incidental mischiefs.

I will only observe on two other very singular effects of this Bill. One is that as protection orders may be cancelled, outsiders would never know without searching a register whether a wife was under disability or free from it—a most inconvenient state of things. The other is that women with bad husbands would be better off as regards the power of applying their money to their wants than those with good ones, for the well-conducted couples would remain under the law of strict settlement; whereas the wife who earned half the family expenses might dispose of her property according to her own judgment. And so, when the wife had some capital which was wanted for the family use, there would be a direct inducement to throw on her the earning of wages.

The Bill is founded on no principle, and would aggravate existing evils.

I have confined myself in these remarks to the broad effects of the Bill, which appears to me only to add one instance to the many that are constantly appearing of the perils that environ those who desert the plain, broad path of simple principles to follow inventions of their own fancies. The existing law we know, and the law of freedom we know; but what is this Bill? Better far the common law than these shackles of paternal government in e'ery household. Mr. Raikes's little finger is

thicker than the loins of the common law; that chastises wives with whips, but he with scorpions.

The true principle is to extend freedom of action.

The essential distinction in all cases between the advocates of freedom and those of restriction is, that the one class trust their fellow-creatures, believe in the capacity of mankind at large to manage their own affairs, and disbelieve in their own capacity to manage the affairs of others; while the other class distrust their fellow-creatures, and think they must go wrong unless directed by the superior wisdom of their betters. In this case Faith, Modesty, Generosity, and Justice all lead us in one direction. Let us trust they will prevail, and that one more shackle on the energies of mankind will be struck away.

A. H.

March 5th, 1870.

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